

**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**DIVISION OF STATE PARKS**  
Honolulu, Hawaii

March 10, 2006

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawaii**

**Regarding:**            **Request to Waive the Untimeliness of Requests For a Contested Case Hearing and to Consider Appointment and Selection of a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing** regarding Board action on February 10, 2006 – auctioning of leases Waimea Canyon/Kokee

**Subject Petitions:**    **Docket No. SPCC-06-01**

In the matter of a Contested Case request applicant Donn and Gale Carswell represented by Daniel Hempey, Esq. with a request from 9 other applicants to join in the Carswell request, contesting, in part, the Board of Land and Natural Resources decision February 10, 2006, to auction the recreation residences land and improvements that are now under some 102 leases at Waimea Canyon/Kokee State Parks, Kauai whose land is now owned by the State of Hawaii, while the improvements will revert to State ownership on December 31, 2006.

**Background**

Between February 21, 2006, and February 27, 2006, the Department received 10 petitions (See Exhibit 1) for a Contested Case, the initial petitioner being Donn and Gale Carswell represented by Daniel Hempey, Esq. contesting the Board of Land and Natural Resources' decision February 10, 2006, to auction the recreation residences land and improvements that are now under some 102 leases at Waimea Canyon/Kokee State Parks, Kauai whose land is now owned by the State of Hawaii, while the improvements will revert to State ownership on December 31, 2006.

**Authority for Designating Hearing Officers**

Hawaii Administrative Rules (HAR) §13-1-32 (d) provides that the BLNR may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR §13-1-29 (a) provides that, "the time for making an oral or written request and submitting a written petition may be waived by the Board."

Additionally, Hawaii Revised Statutes Sections 92-16 and 171-6 also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

### **Basis for Designating Hearings Officers**

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that if a contested case is held, then designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. The determinations of standing have not yet been made. Staff believes that the preliminary hearing on standing, if any, should also be conducted by the Hearing Officer, rather than the full Board. After the Hearing Officer conducts the preliminary hearing on standing, the Board would still retain its discretion in issuing Orders on this matter of standing. Further, should standing be granted, at the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

### **Discussion:**

Staff notes that was no timely oral requests for a contested case. There were requests to contest the Board Action made after the deadline for submitting an application for a contested case hearing and some written petitions were not received in a timely manner. Pursuant to HAR, §13-1-29 Request for hearing, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing. The time for making an oral or written request and submitting a written petition may be waived by the board.

Based on advice from the Department of Attorney General (copy attached), staff is recommending that the Board deny all the requests for contested case hearings.

Staff therefore recommends,

**Recommendation:**

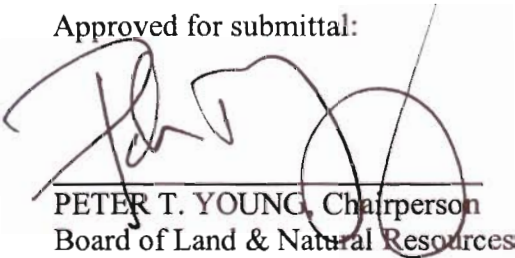
- 1) That the Board waive the timeline, and accept the requests for a Contested Case Hearing which were submitted after the deadline.
- 2) That the Board deny all requests for Contested Case Hearings.

Respectfully submitted,



Daniel S. Quinn, Administrator  
Division of State Parks

Approved for submittal:



PETER T. YOUNG, Chairperson  
Board of Land & Natural Resources



STATE OF HAWAII  
Department of Land and Natural Resources  
Division of State Parks  
Park Planning Branch

February 28, 2006

Re: Petitions Received for a Contested Case Hearing

Attached are copies of the subject matter from the following  
leaseholders:

| Name of Petitioner                      | GL No. | Tax Map Key |
|---|--------|-------------|
| 1) Glen Hontz, Virginia Dumas           | 5071   | 1-4-02: 15  |
| 2) Wayne Jacintho                       | 4972   | 1-4-03: 04  |
| 3) Frank Hay                            | 4992   | 1-4-04: 43  |
| 4) Erik Coopersmith                     | 4986   | 1-4-04: 21  |
| 5) Wm. & Elizabeth Dunford              | 5021   | 1-4-04: 03  |
| 6) Paul & Arline Matsunaga              | 5088   | 1-4-02: 63  |
| 7) Donn & Gale Carswell                 | 5030   | 1-4-04: 28  |
| 8) Robert & Sherill Miller              | 4996   | 1-4-04: 04  |
| 9) Roy Yempuku for<br>Camp Kōke'e Corp. | 5045   | 1-4-04: 47  |
| 10) Anthony & Barbara Locricchio        | 5097   | 1-4-02: 79  |

LINDA LINGLE  
GOVERNOR



MARK J. BENNETT  
ATTORNEY GENERAL

LISA M. GINOZA  
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
LAND TRANSPORTATION DIVISION

Room 300, Kekuanao'a Building  
465 King Street  
Honolulu, Hawaii 96813  
Fax: (808) 587-2999

WRITER'S DIRECT LINE  
(808) 587-2993

WRITER'S E-MAIL  
bill.j.wynhoff@hawaii.gov

March 1, 2006

Mr. Peter T. Young  
Chairperson, Board of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

RE: Requests for contested cases – Koke'e

Dear Mr. Young:

We have reviewed various requests for contested cases regarding the board's decision to dispose of state property at Koke'e, Kauai by auction.

A contested case is "a proceeding in which the legal, rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Haw. Rev. Stat. § 91-1(5) (1993). The phrase "required by law" embraces both constitutional and statutory law. Tai v. Chang, 58 Haw. 386, 388, 570 P.2d 563, 564 (1977).

The persons requesting contested cases have not cited any state law requiring contested cases. In fact, it is evident that they view the board's action as affecting or taking their rights in property, such that contested cases are required by the Hawaii State Constitution, Art. I, Sec. V and the Fourteenth Amendment to the United States Constitution.

The necessary predicate for this argument is that lessees have a property right being affected. We do not agree that any such property right exists. The lease is clear that the lessees own the cabins during the term of the lease. No board action has affected that right. At the end of the lease, each lease requires the lessee to "peaceably deliver" possession of the demised premises to the State at termination "together with all improvements existing or constructed thereon unless otherwise provided." ¶ 31, page 20. Nothing in the lease "otherwise provides."

Related provisions include:

- ¶ 3, page 4 (lessor reserves ownership of all improvements, “excluding any recreation-residence cabin, building or structure existing on the premises prior to the commencement date of this lease” and “improvements constructed during the term of this lease”). It is undisputed that lessees own the cabins during the term of the lease. This provision in no way conflicts with other provisions providing that ownership reverts to the State at the end of the lease.
- ¶ 9, page 8 (ownership of improvements “shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor.”)
- ¶ 21, page 14. (Upon termination for breach “all buildings and improvements thereon shall remain and become the property of the Lessor”)

As a general rule the agreement of the parties controls as to ownership of improvements at the end of a lease. Kassuba v. Realty Income Trust, 562 F.2d 511 (7th Cir. 1977). If there is no written agreement, then improvements revert to the landlord. 49 Am.Jur.2d Landlord and Tenant § 899 (1995). A landlord need not compensate a tenant for improvements surrendered at the end of the term, unless there is a specific agreement to do so. 49 Am.Jur.2d Landlord and Tenant § 902 (1995).

In our case, lessees contracted to surrender their improvements at the end of the term. ¶ 31, page 20. They will not have a property right after the lease expires. Their property rights are not affected by the board’s action.

We note that ownership of the cabins was specifically discussed when the leases were auctioned in 1985. The twenty year lease term was intended “to afford successful bidders . . . an opportunity to amortize the cost” of improvements. See Resubmittal: Lease – Public Auction dated January 25, 1985. Lessees objected to the reversion provision (letter from Koke’e Leaseholders Association to Chair Susumu Ono dated January 25, 1985), but the board insisted on it. Letter from Susumu Ono to Koke’e Leaseholders Association dated February 15, 1985. See also H.R. No. 111 (2002) (“the legislature finds that all of these conditions [relating to the reversion clause] were known and accepted at the time that these leases were consummated. . .”)

This resolution and a companion resolution in the Senate, S.C.R. No. 136 (2002), requested a report on Koke’e from the department. During the public meetings held to support the report, Mr. Donn Carswell (the person presenting the most detailed request for a contested case), acknowledged his understanding of the reversion clause: “When we got the lease at public auction, we objected to the surrender clause and was [sic] told to sign or else.”

In short, a contested case is not required by law – either statutory or constitutional. We believe the appropriate forum for lessees’ claim (should they chose to pursue it), is a court. We recommend that the board deny all the requests for contested cases.

Mr. Peter T. Young, Esq.  
March 1, 2006  
Page 3

Very truly yours,

A handwritten signature in dark ink, appearing to be 'Wynhoff', with a long, sweeping horizontal line extending to the right.

William J. Wynhoff  
Deputy Attorney General

WJW:w